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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-209

PREMIER INDUSTRIAL CORPORATION,
a corporation, *Petitioner*

v.

ROY A. MARLOW AND C & C PRODUCTS, INC.,
a corporation, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-299

PREMIER INDUSTRIAL CORPORATION,
a corporation, *Petitioner*

v.

ROY A. MARLOW AND C & C PRODUCTS, INC.,
a corporation, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

STATEMENT OF THE CASE

The following is presented to briefly supplement the statement of the case submitted by petitioner (hereinafter referred to as "Premier").

Premier Industrial Corporation, an Ohio corporation, filed an action against respondents Roy Marlow and C & C Products Corporation, also an Ohio corporation, in the Circuit Court of Jefferson County, Alabama, alleging that respondents had induced four of Premier's salesmen to leave Premier in violation of their contracts with Premier which contained convenants not to compete. Premier requested the Alabama

court to enjoin C & C from employing these four salesmen in violation of their contracts with Premier. None of the individuals whose contracts Premier sought to enforce were residents of Alabama or parties to this action.

Upon the filing of Premier's complaint an *ex parte* injunction issued in verbatim conformity with Premier's prayer. Thereafter, each defendant filed demurrers, verified answers with supporting affidavits containing numerous affirmative defenses, motions to dissolve the injunction and motions to discharge the injunction. Contrary to Premier's repeated assertions that this is a pleading case, all pleadings filed in this action have been verified and respondents submitted several affidavits in support of their positions. Following the overruling of the motions to dissolve and discharge, defendants filed an appeal to the Supreme Court of Alabama. The trial court's order was reversed and the injunction dissolved. The Supreme Court specifically held that the cause of action stated in Premier's complaint sounded in contract and not in tort; that since Premier had failed to qualify to do business in Alabama the courts of this State were unavailable to it to prosecute its contract claim; and, that the contracts which Premier sought to enforce were void under the law of Alabama and the unpleaded law of other states. *C & C Products, Inc.* v. *Premier Industrial Corp.*, 290 Ala. 179, 275 So. 2d 124 (1972).

Upon remand to the lower court and following dissolution of the injunction Premier filed an amended complaint, virtually identical to the original complaint, requesting the same relief as previously requested. Each defendant filed demurrers, noting that

the allegations of the amended complaint failed to cure the deficiencies of the first complaint recognized as fatal by the Supreme Court of Alabama. The demurrers were sustained and the action dismissed. Premier appealed to the Supreme Court of Alabama, arguing that Premier was not subject to Alabama qualification statutes since its business was wholly interstate in nature and its salesmen were "independent" sales agents whose activities could not be considered the activity of Premier. The Supreme Court of Alabama affirmed, holding that while the verified averments of the amended bill reflected intrastate business activity, even if Premier's arguments were accepted, its salesmen must be deemed "independent contractors" and Premier's contracts would be in violation of the public policy of Alabama reflected in its statutory law making it unlawful to enforce covenants not to compete against one who is not an agent, servant or employee of the covenantee. *Premier Industrial Corp.* v. *Marlow*, — Ala. —, 295 So. 2d 396 (1974).

REASONS FOR DENYING THE WRIT

Essentially, Premier frames two issues in an effort to justify its request that this Court review the action of the Supreme Court of Alabama. First, Premier contends that the ruling of the Supreme Court of Alabama places unconstitutional restrictions on its right of access to the courts of Alabama to enforce contract claims. Second, Premier contends that the Supreme Court of Alabama was obligated to extend full faith and credit to an unreported decision of a United States District Court in Mississippi. The first contention is an insufficient basis for review not only

because of the correctness of the Alabama court's ruling but also because of the existence of an adequate and independent non-federal ground for the ruling. The second contention fares no better simply because the precepts of full faith and credit have no application to this matter.

I. NO UNCONSTITUTIONAL RESTRICTION HAS BEEN PLACED ON PREMIER'S RIGHT OF ACCESS TO THE COURTS OF ALABAMA

Premier argues initially that the State of Alabama has unconstitutionally denied it access to its courts for the enforcement of contract claims. Respondents readily admit the proposition that a non-qualified foreign corporation, engaged solely in interstate commerce, is exempt from the qualification statutes of the State of Alabama.[1] The validity of this proposition is not at issue in this matter. The statutes of Alabama requiring qualification of foreign corporations and denying non-qualified corporations access to its courts have absolutely no effect on a corporation whose activities are interstate in nature. *Simonetti Bros. Produce Co.* v. *Peter Fox Brewing Co.*, 240 Ala. 91, 197 So. 38 (1940). Where a non-qualified corporation engages in localized and intrastate activity, however, Alabama, like its sister states, requires qualification. *Gray-Knox Marble Co.* v. *Times Building Co.*, 225 Ala. 554, 144 So.

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[1] As noted in Petitioner's brief the relevant Alabama statutory provision is Tit. 10, § 21(89) 1940 *Code of Alabama* (Recomp. 1958). Additionally, Tit. 10, § 21(96) provides as follows:

> Exceptions.—The provisions of sections 21(89) through 21 (95) do not apply to corporations organized under the laws of the United States; nor to corporations engaging in or transacting business of interstate commerce only within this state.

29 (1932). In the absence of qualification Alabama restricts the rights of a foreign corporation to utilize the courts of this state to enforce contract claims. *Muller* v. *First National Bank of Dothan,* 176 Ala. 229, 57 So. 762 (1912). Additionally, Alabama will refuse enforcement of contracts which are made outside of this state by unqualified corporations and which are to be performed within this state. *See, Lee* v. *Great Northern Nekoosa Corp.,* 465 F.2d 1132 (5th Cir. 1972).

Such regulation and restriction of foreign corporations do not run afoul of the United States Constitution. *See, Eli Lilly & Co.* v. *Sav-On-Drugs,* 366 U.S. 276 (1961); *Union Brokerage Co.* v. *Jenson,* 322 U.S. 202 (1944); *Railway Express Co.* v. *Virginia,* 282 U.S. 440 (1931). Furthermore, the aforementioned construction and operation of the Alabama qualification statutes have been expressly approved and applied by this Court. *Chattanooga National Building & Loan Assn.* v. *Denson,* 189 U.S. 408 (1903).

The allegations of paragraphs 5 and 6 of the amended complaint describing the activities of Premier in each of the states of the United States reveal activity in Alabama which is not solely interstate in nature. As this Court held in *Eli Lilly & Co.* v. *Sav-On-Drugs, supra,* promotional and service activities conducted within a state constitute intrastate business. Furthermore, if the so-called "independent" sales agents are not deemed independent contractors, then their activities, described in paragraphs 7 and 8 of the amended complaint, must be considered the activity of Premier and Premier's interstate commerce argument is shattered. The Supreme Court of Alabama was correct in its ruling that Premier was engaged in activity which was not solely interstate in nature.

II. AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND SUPPORTS THE RULING OF THE ALABAMA SUPREME COURT

Even if this Court were to disagree with the Alabama court's finding of intrastate activity, no basis would be presented for review since an adequate and independent non-federal ground supports the holding of the Alabama Supreme Court.[2] In its opinion on the second appeal the Supreme Court of Alabama assumed that Premier was correct in its contention that it was engaged solely in interstate commerce. However, the result remained unchanged for the reason that to buttress its interstate commerce argument Premier necessarily had to contend that its salesmen were independent contractors so that their activities would not be considered the activities of Premier. If these salesmen are in fact independent contractors then the covenants which Premier seeks to enforce are absolutely void under Alabama law and repugnant to its public policy. The Supreme Court of Alabama stated:

> Premier argues that paragraphs 7 and 8 of the amended bill show it was engaged in interstate commerce. Assuming for the sake of argument that this contention has merit, the result is not changed. Paragraphs 7 and 8 do not describe "one who is employed as an agent, servant or employee," Tit. 9, § 23, but described an independent contractor.

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[2] It has long been a rule of this Court that an invitation to review a decision of a state court will be declined where the state court's decision rests upon an adequate and independent state ground. *See, Henry* v. *Mississippi*, 379 U.S. 443 (1965); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Ruck* v. *California*, 343 U.S. 99 (1952). On this basis alone the petition must be denied.

If these "independent sales agents" are independent contractors, then the contract is not enforceable in Alabama because it is void. Tit. 9, § 22, Code 1940, provides:

> "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent, void."

The only exceptions in §§ 23 and 24 pertinent here is "one who is employed as an agent, servant, or employee" and if these "independent sales agents" are independent contractors, the contract sought to be enforced is void.

> *Premier Industrial Corp.* v. *Marlow,* Supp. App. to Petition for Writ of Certiorari, 5-6.

Thus, even assuming that Premier is correct in its contention that it is engaged only in interstate commerce in Alabama, an independent wholly sufficient non-federal ground exists for the holding of the Supreme Court of Alabama. Premier cannot overcome this proposition simply by arguing that the contracts here involved were made in states other than Alabama and are to be governed by the laws of states other than Alabama. Even though a contract may be valid under the laws of the place of making and place of performance it will not be enforced where violative of the public policy of the state where enforcement is sought.[3]

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[3] See *Griffin* v. *McCoach,* 313 U.S. 498 (1941); *Richland Development Company* v. *Staples,* 295 F.2d 122 (5th Cir. 1961).

III. PRINCIPLES OF FULL FAITH AND CREDIT HAVE NO APPLICATION TO THIS CASE

The second argument asserted by Premier as a basis for its petition is the failure of the Supreme Court of Alabama to accord full faith and credit to a decision of the United States District Court in Mississippi. This argument badly misses the mark. The full faith and credit provision of the Constitution is simply not involved and there was just no occasion for extending full faith and credit to this decision.

The Mississippi action was initiated by Premier against George Sides. In the original complaint filed in Alabama Premier had asked the Alabama court to grant relief with reference to the contract which Premier had with Sides. This was merely an incidental part of the Alabama action and Premier requested different and additional relief unrelated to Sides. Sides was not a party in the Alabama action nor were the defendants in this action a party to the Mississippi litigation. The object of the Mississippi litigation was to enforce the convenant not to compete which Sides had executed with Premier. Shortly after the decision of the Alabama Supreme Court in the first appeal Premier, in its application for rehearing, informed the Alabama court of the decision of the Mississippi action. Likewise, in the second appeal to the Supreme Court of Alabama Premier informed the court of the action of the Mississippi court. At no time, however, did Premier seek to enforce the Mississippi judgment in the Alabama action. Indeed, the amended complaint filed in Alabama, unlike the initial complaint, does not request any relief with respect to Premier's contract with Sides.

The Mississippi court applied a Mississippi statute and Mississippi law in reaching its decision. The Alabama court applied an Alabama statute and Alabama law in reaching its decision.[4] Different results were reached under different statutes, a common occurrence in cases considering the effect of a corporation's failure to qualify to do business in any given state. The Alabama action never went beyond this threshold question, a question which had to be answered through the use of Alabama statutes and Alabama law. The Alabama judgment does not alter, impair, or affect in the slightest the operation or impact or effectiveness of the Mississippi judgment. No Alabama court was asked to enforce this judgment. A copy of it is not even contained in the record of the Alabama proceedings. Under these circumstances, full faith and credit simply have no application. In cases of this type the full faith and credit clause does not obligate Alabama to apply any law or policy other than its own. *See, New York Life Ins. Co.* v. *Cravens,* 178 U.S. 389 (1900); *National Mutual Building & Loan Assn.* v. *Brahan,* 193 U.S. 635 (1904).

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[4] The Alabama Supreme Court was not obligated to apply the law of Mississippi. As pointed out to Premier in the first appeal, under settled Alabama choice of law rules Premier's failure to plead the law of the sister state led to the presumption that the law of that state was identical to the law of Alabama. *See, C & C Products, Inc.* v. *Premier Industrial Corp.*, 290 Ala. 179, 185, 275 So. 2d 124, 130 (1972).

CONCLUSION

This case is not worthy of review by this Court. It presents absolutely no question of legitimate interest for consideration by this Court. Accordingly, it is requested that Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Certificate of Service

I, Drayton Nabers, Jr., counsel for respondents and a member of the Bar of the Supreme Court of the United States, certify that I have served a copy of the foregoing response to Petition for A Writ of Certiorari on Messrs. Rives, Peterson, Pettus, Conway & Burge, 800 First National-Southern Natural Building, Birmingham, Alabama 35203, attorneys for petitioner, by depositing the same in the United States Post office with first class postage prepaid, addressed to them at the above address, the 17th day of October, 1974.

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